Supreme Court, U.S.
FILED
NOV 19 2003
OFFICE OF THE CLERK

No. 02-1267

In the Supreme Court of the United States

CHARTER COMMUNICATIONS, INC.,
CHARTER COMMUNICATIONS PROPERTIES, LLC, AND
PAUL G. ALLEN, PETITIONERS

v.

SANTA CRUZ COUNTY, CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a local franchising authority may refuse to consent to transfer of a cable television franchise so long as, viewed under a highly deferential standard, the authority has one or more plausible and permissible bases for doing so, even if the local franchising authority's refusal was also in fact based on one or more factors not permitted by federal law.

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

Petitioners maintain that a local franchise authority improperly denied their application to transfer a cable television franchise to the new owner of the local cable system in Santa Cruz County, California. The district court found that the County's denial was based on multiple reasons and that action taken on the basis of each of those reasons would violate federal law. The court of appeals left most of the district court's findings unreversed, but held that the County acted

properly because there was at least one plausible basis on which it could have acted that would not have violated federal law.

The Ninth Circuit's standard gives inadequate protection to federal law, because it permits local authorities to act for reasons that violate federal law, so long as they also have at least one plausible, legal basis for acting. Although the Court may wish to grant review for that reason, this case is the first to have addressed the problem of "mixed motives" in this setting, and this Court's review may appropriately await the further development of the law in this area in future cases and in other courts of appeals.

1. Throughout its history, cable television in the United States has primarily "been regulated at the local government level through the franchise process." H.R. Rep. No. 934, 98th Cong., 2d Sess. 19 (1984) (*1984 House Report*). Until the 1980s, franchise obligations and renewal procedures would typically "vary from city to city, and state to state." *Id.* at 25. In 1984, Congress concluded that the absence of uniform national standards for cable franchising was impeding the development of the technology. To address that problem, Congress passed the Cable Communications Policy Act of 1984 (1984 Cable Act), Pub. L. No. 98-549, 98 Stat. 2779 (42 U.S.C. 521 *et seq.*). The Act imposed a cap on the amount of franchise fees that local officials could assess on cable systems. 47 U.S.C. 542(b). It also adopted standards restricting the ability of franchising authorities to regulate the services, facilities, and equipment provided by cable operators. 47 U.S.C. 544. Those provisions and others in the 1984 Cable Act were designed "to provide stability and certainty to the process of granting and renewing cable franchises," *1984 House Report* 22, which in Congress's judgment were "essential" to the growth and development of cable television. *Id.* at 20.

More recently, Congress has further limited the power of local franchise authorities to regulate cable television. In 1992, Congress gave the Federal Communications Commission exclusive jurisdiction over rate regulation for certain categories of cable television service. See Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act), Pub. L. No. 102-385, § 3, 106 Stat. 1464; 47 U.S.C. 543.

Four years later, as part of the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, Congress set a sunset date of March 31, 1999, for the regulation of most cable programming service rates. 47 U.S.C. 543(c)(4). Since that date, neither the FCC nor any state or local government has had the authority to regulate rates for cable services outside a basic service tier. See 47 U.S.C. 543(b)(7) (defining basic cable service tier).

2. Before control of a cable system can change hands, the parties to the transaction ordinarily must apply to the local franchise authority for authorization to transfer control of the cable franchise to the proposed new owner. As part of the 1992 Cable Act, Congress imposed a time limit on local governments' review of applications for franchise transfers. As now codified at 47 U.S.C. 537, the Act specifies that local franchise authorities have 120 days to act upon any transfer request "that contains or is accompanied by such information as is required in accordance with Commission regulations and by the franchising authority." Moreover, "[i]f the franchising authority fails to render a final decision on the request within 120 days, such request shall be deemed granted unless the requesting party and the franchising authority agree to an extension of time." 47 U.S.C. 537.

To implement that provision, the FCC adopted rules specifying the information that transfer applicants must provide to local franchise authorities. *Implementation of Sections 11 and 13 of the Cable Television Consumer Protec-*

tion and Competition Act of 1992, 8 F.C.C.R. 6828, 6840 (1993). The Commission developed a standardized form known as FCC Form 394, which was designed to include information necessary for applicants to demonstrate the legal, technical, and financial qualifications of a prospective new owner. Among other things, Form 394 requires transfer applicants to produce a balance sheet and income statement for at least one full year, as well as a narrative account of the transferee's technical qualifications to operate a cable television system. See *id.* at 6867-6876 (App. B).

FCC rules provide that after a cable operator seeking approval for a franchise transfer submits to the local franchising authority "a completed FCC Form 394, together with all exhibits, and any additional information required by the terms of the franchise agreement or applicable state or local law," the authority has 120 days in which to review the transfer. 47 C.F.R. 76.502(a). The rules also impose a separate, 30-day deadline: "A franchise authority that questions the accuracy of the information provided [by the cable operator] must notify the cable operator within 30 days of the filing of such information, or such information shall be deemed accepted, unless the cable operator has failed to provide any additional information reasonably requested by the franchise authority within 10 days of such request." 47 C.F.R. 76.502(b).

When it promulgated the rules, the Commission stated that "[i]n addition to the information specifically solicited by the FCC Form, franchise authorities are permitted to request such additional information as is reasonably necessary to determine the qualifications of the proposed transferee." 8 F.C.C.R. at 6840. The FCC also, however, warned local franchise authorities not to use their review of transfer applications as a device for evading federal law: "[I]n exercising their transfer jurisdiction, franchising authorities may not seek to circumvent the Commission's authority over rate

regulation, franchise fees or other matters. For example, a franchising authority may not delay a transfer or impose conditions on a transfer authorization that would impinge upon the Commission's statutory authority." *Id.* at 6834 n.38.

3. In July 1998, Paul Allen, the co-founder of Microsoft, entered into an agreement to purchase Charter Communications, Inc., a cable operator that holds cable franchises in Santa Cruz County and nearly 500 other communities throughout the United States. Pet. App. 21a. The company filed an application to transfer its cable franchise, including an executed FCC Form 394, with each of its local franchise authorities. *Id.* at 24a.

Charter filed its Form 394 with Santa Cruz County on August 18, 1998. Pet. App. 22a. Less than two weeks later, the County sent Charter a lengthy request for additional information, with some 70 questions that centered on the possible future impact on rates and details of the economics of the proposed transaction. *Id.* at 28a, 60a. Charter responded by producing "a two-inch thick, written response with back-up documents" on September 17, 1998. *Id.* at 29a.

On November 2, 1998, the County presented Charter with a second information request that "included 31 paragraphs of inquiry." Pet. App. 33a. Charter refused to provide any further information, taking the position that the County's second information request was unreasonable and that the County already had sufficient information to assess the merits of the transfer application. *Id.* at 34a-36a.

Also on November 2, the County proposed that Charter undertake and pay for a "due diligence study" to assess the financial feasibility of Allen's acquisition of Charter and the impact of the transaction on future cable rates. Pet. App. 25a-27a, 30a-33a. Charter declined to finance or conduct such a study. It contended that the County's concerns about

Charter's financial viability were unwarranted. *Id.* at 36a-38a.

On December 8, 1998, the County's Board of Supervisors adopted a resolution denying Charter's transfer application. The resolution stated that the transfer application

> is hereby disapproved for the following reasons:
>
> (a) The Applicants have failed to timely provide all necessary additional information, as requested by the County in writing, relating to the Transfer's potential impact upon existing and future rates and the legal, technical and financial qualifications of the Buyer to own and operate the cable television system serving the County (the "System").
>
> (b) The Applicants have refused or failed to reasonably cooperate with County Staff, Special Counsel, and outside consultants retained by the County in undertaking the due diligence investigation of the Transfer.
>
> (c) The Buyer has failed to demonstrate that it is a technically and financially qualified applicant for the following reasons[.]

C.A. E.R. 350; see Pet. App. 38a-39a. The resolution continued with a recital of reasons why the information supplied by Charter was allegedly insufficient. C.A. E.R. 350-356.

After the Board denied Charter's application, Charter sought to ascertain what it could do to obtain approval of the transfer without responding to the additional information requests. On December 15, 1998, the Board adopted a resolution authorizing approval of the transfer agreement so long as Charter "substantially satisfie[d] most of" the following conditions: "[e]xtend[ing] the rate freeze" that had been imposed in connection with Charter's earlier acquisition of the local cable franchise, "improv[ing] the indexing

method for rate increases," and "[p]rovid[ing] the County with a mitigation payment" of $500,000. Pet. App. 41a; see C.A. E.R. 468. Charter refused to accept those conditions. Pet. App. 41a.

On December 23, 1998, the transaction closed without the approval of Santa Cruz County. Pet. App. 42a. In March 1999, the County issued a preliminary notice that Charter had violated the franchise agreement by closing the transfer without the County's consent. The notice threatened to terminate or revoke the franchise agreement and/or seek liquidated damages. *Ibid.*

4. Charter and Allen filed suit against the County in the United States District Court for the Northern District of California. They alleged that the County had unreasonably withheld approval of Charter's transfer application. They advanced claims under 42 U.S.C. 1983 that the County's action violated the First Amendment and the Just Compensation Clause of the Fifth Amendment. They also claimed that the County's action violated several provisions of the Cable Act and constituted a breach of their contract with the County. In an order issued on November 10, 1999, the district court dismissed petitioners' Just Compensation claim as unripe and dismissed their Cable Act claim on the ground that petitioners had no private right of action under the Act. The court allowed petitioners' First Amendment and state-law contract claims to go forward.

Following a two-week bench trial, the district court ruled in favor of Charter and Allen. The district court found that the County's denial of Charter's transfer application "was based upon plaintiffs' refusal to comply with the County's information requests, its demand for an independent financial study to be financed by Charter, its demand for cash payment of $500,000 and its demand for a further rate freeze." Pet. App. 42a-43a. The district court found that each of those reasons for the denial was unlawful.

a. First, based in part on its analysis of the FCC's 120-day and 30-day rules, see Pet. App. 44a-60a, the court concluded that the County's requests for additional information were "unreasonable." *Id.* at 61a, 62a. The court found that the "massive and sweeping" first request consisted mostly of "boiler-plate questions having little or nothing to do with the actual transaction" and that it included "a large number of other questions" about financing arrangements that were not a part of the transaction. *Id.* at 61a.

The court found that the County's November 2 information request asked numerous questions based on a faulty reading of Charter's earlier responses, that it "would have required Charter to go out and locate third-party sources of information and then to vet its internal projections against such external data," and that it attempted to resurrect issues that were "procedurally foreclosed" to the County under the court's interpretation of the FCC's 30-day rule. Pet. App. 62a-63a. The court found that "the large number [of questions] actually propounded and the bone-crushing work the answers would have entailed rendered them unreasonable in scope." *Id.* at 62a.

Finally, the court found that the proposed scope of the County's demand on November 2 that the County conduct a due diligence study was "unreasonable and unlawful." Pet. App. 64a. The court explained that "[g]ranting that [the franchising authority] has the right to make reasonable detailed inquiries into the extent to which a change of control would impact rates and/or service," the connection between the information sought "and any future impact on rates and service was simply too remote and tenuous to qualify as reasonable additional information in an expedited process limited to 120 days." *Ibid.*

b. The district court also determined that the County's demands that Charter bear the $39,000 cost of the due diligence study and make a "mitigation payment" of $500,000

violated federal law governing franchise fees, because the County was already collecting the maximum franchise fee permitted under the Communications Act—five percent of Charter's annual revenues from cable services. Pet. App. 67a; see 47 U.S.C. 542(b). The court rejected the County's contention that Charter's failure to pay for the due diligence study was not a basis for its December 8 refusal to consent to the transfer, characterizing that contention as "simply not true" and "palpably wrong." Pet. App. 68a, 69a. See also *id.* at 70a ($500,000 payment "blatantly illegal—a further violation of the * * * statutory cap" on franchise fees).

c. Finally, the district court ruled that the County could not lawfully condition approval of Charter's franchise transfer on the extension of the rate freeze the County had first obtained when Charter had itself acquired the local cable franchise from Sonic Cable Television in 1998. Pet. App. 16a-19a. Federal law prohibits local franchising authorities from regulating the rates of cable services outside the basic service tier. 47 U.S.C. 543. The court had already found that the rate freeze the County had obtained in connection with the Sonic transaction was "illegal under federal law." Pet. App. 21a. The court held that the County's effort to condition its approval of the transaction after December 8 on an extension of the rate freeze was "illegal too" and "violated federal law." *Id.* at 70a, 71a.

d. Having found that the County's denial of Charter's transfer application "was unlawful on multiple grounds," the district court determined that the County had violated its franchise agreement by unreasonably withholding its consent to Charter's change in ownership. Pet. App. 78a. The district court further found that the County's refusal to approve the transfer violated the First Amendment. *Id.* at 72a-77a.

5. The Ninth Circuit reversed. Pet. App. 1a. In the court's view, the case presented "one central issue: did

Santa Cruz County reasonably withhold consent to a change in ownership of a cable franchise?" *Id.* at 2a. See *id.* at 5a ("central question" is "was the County's denial of consent unreasonable").

The court held that, because it was "reviewing a discretionary decision of the County Board of Supervisors, a legislative body," and because it was in part reviewing "requests for information," "the discretion within which the government operates is broad." Pet. App. 5a-6a. The court concluded that, under a "deferential standard" of judicial review, "the County's denial of consent should be upheld as long as there is substantial evidence for any one sufficient reason for denial." *Id.* at 7a. See *id.* at 8a ("We must therefore examine whether any one of the reasons offered by the County Board in its decision and attached exhibits survives scrutiny under a deferential standard.").

The court observed that the County had identified various grounds for denying consent to the transfer, including "Charter and Allen's failure to affirmatively demonstrate financial qualifications to operate a cable system." Pet. App. 8a. Notwithstanding Allen's substantial personal wealth, the court concluded "that it was not unreasonable for the County to be concerned about Allen's true net worth and about the relationship of that wealth to the viability of the enterprise." *Id.* at 9a. The court also addressed "the County's articulated concern for keeping stable the subscriber rates in the future." *Id.* at 9a. The court noted that FCC rules precluded the franchisee from raising rates based on Allen's purchase price for Charter, but observed that "those rules are subject to change." *Id.* at 10a. The court concluded that "it could hardly be unreasonable for the County to be worried about the long-term viability of the Allen purchase and its effects on the County's responsibility to assure a stable cable franchise for its citizens." *Ibid.*

The court therefore held that those "concerns * * *, which were articulated by the County in its denial of consent, were sufficient to justify the County's decision." Pet. App. 11a. The court concluded that it "c[ould] not say the County acted without a rational basis or without substantial evidence for its decision to deny consent," and it reversed the district court's judgment on that basis. *Ibid.* In the court's view, "[b]ecause the record substantially supports at least some of the reasons offered by the County," it did not have to address the question whether "the County acted unlawfully, and therefore unreasonably, in its attempts to gather information beyond what was permitted by * * * the Cable Act and the FCC regulations." *Id.* at 3a n.3. Indeed, the court stated that there is "no reason for either the district court or this panel to reach the issues regarding the Cable Act." *Ibid.* See *id.* at 12a (court "need not reach the other issues addressed by Charter and the district court"). The court thus did not address whether the County's information requests were unreasonable or whether the County had refused its consent for reasons, such as its desire to obtain a rate freeze extension or a $500,000 mitigation payment, that were impermissible under the Cable Act.

Finally, the court disposed of Charter's First Amendment claim on the ground that Charter had "voluntarily entered into an agreement under which the County had to approve any transfer of the franchise," and Charter had, "to that extent * * * waived its right to claim that a denial of a transfer violated the First Amendment." *Id.* at 11a, 12a. See *id.* at 12a n.9 ("Charter was aware of what it was getting itself into.").

DISCUSSION

The district court found that the County had failed to consent to Charter's transfer application for several reasons, all of which were unlawful and beyond the County's authority

under federal law. The court of appeals did not disturb most of those findings, but instead held that because there was in its view "substantial evidence for * * * one sufficient reason for denial," Pet. App. 7a, the County's denial of consent was lawful. The Ninth Circuit erred in concluding that the County's action could be found to be reasonable, and therefore lawful, without *any* inquiry into whether the County had in fact acted for reasons forbidden under federal law.

The Ninth Circuit's error in this case could threaten to undermine important federal restrictions on local cable regulation. Although the Court may wish to grant review in this case to address that concern, it would not be inappropriate for this Court's review to await further developments in the lower courts. The question presented in this case does not appear to have arisen yet in any other appellate case. If the issue is one of genuine significance, it can be expected to arise in other circuits and in other factual settings in the future. This Court might benefit from further analysis by the courts of appeals of cases, like this one, in which a cable franchising authority is found to have acted with mixed motives, some of which are lawful under federal law and some of which are not.

A. The Court Of Appeals Held That The County Had Acted Reasonably, Despite Unreversed District Court Findings That The County Had Acted For Reasons That Were Impermissible Under Federal Law

1. In the present posture of this case, it must be assumed that the County refused its consent to the transfer for five reasons. The County's December 8 resolution denying the transfer application recited that it was based on: (1) Charter's "failure to provide all necessary additional information, as requested by the County in writing," (2) Charter's "refus[al] or fail[ure] to reasonably cooperate * * * in under-

taking the due diligence investigation of the Transfer," and (3) Charter's failure "to demonstrate that it is a technically and financially qualified applicant." C.A. E.R. 350. The district court found that the denial was also based on (4) Charter's "refusal to comply with the County's * * * demand for cash payment of $500,000" and (5) "its demand for a further rate freeze," as expressly embodied in the County's December 15 resolution. Pet. App. 43a.

The district court concluded that each of those five factors was a forbidden basis for action under federal law. The court ruled that the County's additional information requests were "unreasonable" and inconsistent with the expedited, 120-day process mandated by 47 U.S.C. 537. Pet. App. 61a, 62a, 64a. The district court also found that federal limits on franchise fees, see 47 U.S.C. 542(b), precluded the County from requiring Charter to pay for the due diligence study. Pet. App. 70a. The court found that Charter's technical and financial qualifications had to be deemed to be established because the County had not timely requested information on those subjects under the FCC's 30-day rule, *id.* at 61a-62a, and that accordingly "the threshold issues of financial, legal and technical qualifications were established." *Id.* at 63a. Finally, the district court found that requiring Charter to pay the $500,000 mitigation fee was "blatantly illegal" because it contravened the federal limit on franchise fees, *ibid.*, and that the County's attempt to obtain a further rate freeze "violated federal law," *id.* at 70a, 71a.

2. The court of appeals found it unnecessary to address the district court's findings that the County had acted for multiple reasons that were impermissible under federal law. According to the court of appeals, the dispositive question was "whether any *one* of the reasons offered by the County Board in its decision * * * survives scrutiny under a deferential standard." Pet. App. 8a (emphasis added). Under that standard, the court concluded that the County's proffered

concerns about Allen's "true net worth and * * * the relationship of that wealth to the viability of the enterprise," *id.* at 9a, as well as "the long-term viability of the Allen purchase and its effects on the County's responsibility to assure a stable cable franchise for its citizens," were "not unreasonable." *Id.* at 9a, 10a. Those concerns were therefore viewed as being "sufficient to justify the County's decision," because the County had not "acted without a rational basis or without substantial evidence for its decision." *Id.* at 11a.

The court of appeals' decision thus left undisturbed the district court's findings that the County was not permitted by federal law to act on at least four of the five bases for its decisions—Charter's failure to comply with the County's unreasonable information requests, Charter's failure to fund and conduct a due diligence study, Charter's failure to pay the mitigation fee, and Charter's failure to extend the rate freeze. Indeed, although it appears that the court of appeals may have disagreed with the district court's conclusion that the remaining basis for the denial—Charter's financial, technical and legal qualifications—had been established, the court of appeals did not reject the district court's interpretation of the FCC's 30-day rule, under which the County was required by federal law to accept at least some of those qualifications.

The court of appeals found it unnecessary to resolve whether the County had acted for reasons that violate federal law, because the court believed that, even if the district court's findings were correct, the County's action must be upheld as "reasonable" so long as "any one of the reasons offered by the County Board in its decision * * * survives scrutiny under a deferential standard." Pet. App. 8a. Because the County had "at least some good reasons" for acting, the court believed that there was "no reason for either the district court or this panel to reach the issues regarding the Cable Act." *Id.* at 3a n.3. See *id.* at 12a ("We * * *

need not reach the other issues addressed by Charter and the district court."). Thus, the court of appeals' decision stands for the proposition that a franchise authority acts "reasonably" in denying a transfer application so long as, applying a "deferential standard," there is "substantial evidence for any one sufficient reason for denial" that does not violate the Cable Act. *Id.* at 7a.[1] The fact that the County had other reasons for the denial that violated federal law, or that those other reasons may have been crucial to the County's decision, is of no relevance under the court of appeals' analysis.

B. The Court Of Appeals Erred In Permitting The County To Act For Reasons That Violate Federal Law

1. The court of appeals' standard fails to provide adequate protection to federal law and federal interests in this area.[2] Where only state-law rights are at stake, a State has broad latitude to construe a contract provision prohibiting franchising authorities from unreasonably withholding their consent to a franchisee's application. In such a setting, a

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[1] The court of appeals' citations to this Court's cases applying rational basis scrutiny to legislative classifications that are *not* prohibited by the Constitution or federal law confirm that the court intended an exceptionally deferential review. See Pet. App. 7a (citing *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 315 (1993), for the proposition that "attacks on legislative arrangements have [the] burden of refuting each conceivable basis that might support it"), 8a (citing *United States R.R. Ret. Bd.* v. *Fritz*, 449 U.S. 166, 179 (1980)). Indeed, at one point the court stated that "the ultimate question is whether the County *could reasonably have denied its consent* under the circumstances." Pet. App. 3a-4a (emphasis added).

[2] The FCC has not had occasion to address the district court's interpretations of the Cable Act and of the pertinent FCC regulations. The government accordingly takes no position on whether the district court correctly construed those provisions.

State could perhaps determine that such a provision means only that the authority must have one "fairly debatable" basis for withholding its consent.[3] But where, as here, federal law prohibits a franchising authority from acting for certain reasons, the authority's action cannot be upheld on the ground that the authority may have had permissible, as well as impermissible, reasons for acting.

2. The Ninth Circuit's decision upholding the County's denial of the transfer application invites circumvention of federal law by local franchising authorities and would fail to vindicate important federal rights. For example, in *City of New York* v. *FCC*, 486 U.S. 57 (1988), this Court upheld the FCC's preemption of local cable technical standards that differ from federal standards. Nonetheless, under the Ninth

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[3] The court of appeals cited (Pet. App. 7a-9a) three state cases that applied a deferential "substantial evidence" or similar test to a local administrative decision. Each of those cases involved a claim that the challenged decision was not supported by the evidence. None of those cases, however, involved a claim that the challenged decision was made on a basis that was independently prohibited under state or federal law. See *Gifford* v. *City of Los Angeles*, 106 Cal. Rptr. 2d 164, 168 (Ct. App. 2001) (denial of permit to carry concealed firearm held not to be arbitrary or capricious); *Desmond* v. *County of Contra Costa*, 25 Cal. Rptr. 2d 842, 842 (Ct. App. 1993) (denial of land use permit to build second residential unit on a lot supported by substantial evidence); *Saad* v. *City of Berkeley*, 30 Cal. Rptr. 2d 95, 95 (Ct. App. 1994) (denial of permit to build residential unit on lot). Thus, none of those decisions stands for the rule adopted by the court of appeals.

The County suggests (Br. in Opp. 15) that *Communication Systems, Inc.* v. *City of Danville*, 880 F.2d 887 (6th Cir. 1989), and *Union CATV, Inc.* v. *City of Sturgis*, 107 F.3d 434 (6th Cir. 1997), support deferential review here, but those cases are equally inapposite. *Communication Systems* addressed only state-law claims. See 880 F.2d at 890-892. In *Union CATV*, there was no finding of a federal violation; the limited "deference" found appropriate by the Sixth Circuit in that case extended only to the local government's exercise of its federal statutory authority to make certain policy choices. 107 F.3d at 438-442.

Circuit's decision, a franchise authority could expressly condition the grant or transfer of a franchise on the cable operator's adoption of technical standards that deviate from the norm established by FCC rules, so long as the authority also identified a plausible alternative rationale for its action.

Similarly, federal law caps local franchise fees and precludes localities from regulating most cable rates. See 47 U.S.C. 542(b), 543. Franchising authorities may have substantial financial and political incentives to circumvent those federal limitations. Under the Ninth Circuit's decision, a franchising authority could accomplish the forbidden ends by doing what the district court found, in unreversed findings, the County did here—expressly conditioning approval of a franchise application on the franchisee's agreement to pay more than the permissible franchise fee or to limit its rates in ways not permitted by federal law. So long as the authority identifies one plausible alternative basis for its action, that action would be upheld. Indeed, although the district court made no ultimate finding that the County's course of conduct was completely pretextual, the court found "plausible evidence * * * to support" Charter's claim in this case that the County "planned all along to raise marginal concerns and eventually to trade them off for illegal considerations, such as the half-million dollar fee." Pet. App. 71a n.10. Under the Ninth Circuit's standard, it appears that the County's "marginal concerns" would be sufficient to sustain its action, regardless of whether the County was raising those concerns in an effort to obtain fees and rate freezes that are beyond its authority under federal law.

3. In other "mixed motive" contexts in which federal law prohibits an action based on the reasons for the action, this Court has long applied a "motivating factor" analysis. Under that analysis, a challenged action based on both permissible and impermissible motives violates the federal prohibition unless the same action would have been taken in the absence

of the impermissible motives. See, *e.g.*, *Desert Palace, Inc.* v. *Costa*, 123 S. Ct. 2148, 2150 (2003) (mixed motive under pre-1991 Title VII); *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 287 (1977) (dismissal of teacher challenged as based in part on exercise of First Amendment rights); *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266, 270 (1977) (municipal zoning decision challenged as based on racially discriminatory purpose); *NLRB* v. *Transportation Mgmt. Corp.*, 462 U.S. 393, 401 (1983) (unfair labor practice charge that discharge of employee was based on "antiunion animus"). See also Restatement (Second) of Torts §§ 431(a) (liability if negligence is "substantial factor in bringing about the harm"), 432(1) (negligence not "substantial factor * * * if the harm would have been sustained even if the actor had not been negligent") (1965). A similar standard, rather than the court of appeals' "any permissible factor" standard, would be appropriate here.

C. Although The Issue Is Potentially One Of Importance, Review By This Court Could Await Further Development In Future Cases

Petitioners assert (Pet. 29) with some justification that, under the court of appeals' decision, "other local governments may use the transfer process to demand concessions and extract *quid pro quos* from franchisees that otherwise would be unlawful under federal law." That is a disturbing prospect, and it threatens the achievement of the Cable Act's purposes to "establish a national policy concerning cable communications," 47 U.S.C. 521(1), and to "promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems," 47 U.S.C. 521(6). This Court accordingly may wish to grant certiorari in this case. If the Court does grant review, the Court may wish to reframe the question

presented along the lines suggested in this brief. See p. I, *supra*. That question would focus the briefing on the core issue that would warrant this Court's attention.[4]

On balance, however, the Court may benefit from postponing review until other courts of appeals have had the opportunity to consider the question presented. The parties do not cite any other similar "mixed motive" case involving local franchising authorities under the Cable Act.[5] If the Ninth Circuit's decision in this case indeed resolved issues of continuing importance, it can be expected that other courts of appeals will have opportunities to address similar issues in the future. This Court would then have the benefit of those courts' development of the law, as applied in a variety of factual settings, before this Court itself would have to address the governing principles. Thus, although this Court's review

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[4] In our view, the First Amendment question presented in the petition does not warrant this Court's review. In the circumstances of this case, the First Amendment gives petitioner at most a right to demand just what it obtained in its contract—that the County not unreasonably withhold its consent to a transfer. If the County's withholding of consent in this case was reasonable, then the First Amendment is satisfied. If the County's withholding of consent was unreasonable, then the case should be disposed of on the ground that the County violated the contractual provision, without reaching any First Amendment question.

[5] This case could perhaps be viewed as involving one potential procedural complexity, because the federal question arises in the context of a state-law breach-of-contract dispute over whether the County complied with its agreement not unreasonably to withhold its consent to a transfer application. Respondent's brief in opposition does not deny that this case presents a federal question under the Cable Act, however, and neither the court of appeals nor the parties cited any California precedent suggesting that it would be considered "reasonable," under California law, for a party to take actions on a basis that would violate federal law. In any event, if any California law did purport to authorize such action, it would likely itself be preempted, especially where, as here, it would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

of the question presented may well be warranted at some point, it would not be inappropriate to postpone such review until the issues can be fleshed out by the courts of appeals in future cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2003